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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. THOMAS COLABINE, Defendant and Appellant.	C074144 (Super. Ct. No. 12F06176)

On May 21, 2012, at 10:42 p.m., California Highway Patrol Officer Michael Waggoner was dispatched to a hit-and-run incident at an apartment complex in Carmichael. He was flagged down by Louis Lovett, who showed him the right rear bumper of his black Dodge Charger, which was slightly dented and had white paint on it. A white Chrysler Sebring was parked in the middle of two stalls. The Sebring's right rear was dented and had black paint on it, and its hood was warm to the touch.

Lovett pointed at apartment 34, where defendant Thomas Colabine and Leigh Ann Sencion were looking out the window at them. Defendant and Sencion shut the blinds as

soon as they noticed Officer Waggoner looking at them. Lovett said he wanted to exchange information with defendant; Waggoner told Lovett to wait for him to contact defendant.

Officer Waggoner knocked on defendant's apartment door and identified himself. Sencion told defendant to open the door and speak to the police, but defendant refused. Officer Waggoner looked into the window and saw defendant run from the main area into the hallway. Defendant then came out of a window and crouched down in the backyard. Officer Waggoner told defendant to stop hiding and talk to him, but defendant went through the window and back into his apartment. Officer Waggoner ran to the front door and knocked; defendant opened the door after two to three minutes and started yelling. Defendant said that he had been sleeping in the apartment for about five hours before being awakened when Officer Waggoner knocked on the door. He also said that he had not consumed any alcohol.

Officer Waggoner detained defendant, who shouted to Sencion, "don't say anything." While escorting defendant to his patrol car, Officer Waggoner noticed that defendant displayed signs of intoxication—red, watery eyes, slurred speech, the odor of alcohol, drooping eyelids, and being unsteady on his feet. Officer Waggoner opined that defendant was driving under the influence of alcohol at the time of the collision.

Defendant was arrested and taken to the highway patrol office. His blood was drawn at 11:59 p.m. The blood-alcohol level was 0.26 percent.

In recorded phone calls from jail to Sencion, defendant stated, "my dumb ass shouldn't have been driving" and "we'd been drinking, right?" He also said that when Lovett's girlfriend indicated she would file a police report, defendant was thinking, "I cannot do that. I will go straight to jail for a DUI is what'll happen."

Sencion testified that on that day, defendant picked her up from work at about 3:30 p.m. and they went to the grocery store, where they purchased two bottles of wine. They got home at around 4:30 p.m., had dinner, and consumed the wine. Defendant also

drank cranberry juice and vodka. When Sencion heard officers banging on the door, she got dressed and answered the door.

Defendant testified that he and Sencion consumed two bottles of wine during the evening before driving. He drank a little less than half the wine, about four to five drinks. When they ran out of wine, they went to the store to buy vodka. On the way back, Lovett backed into defendant's car. They swapped information and defendant told Lovett which apartment was his. Defendant and Sencion then returned home and drank significant amounts of vodka. He was not impaired while driving.

The parties stipulated that defendant's driver's license was suspended on May 21, 2012, and defendant knew this fact.

A jury convicted defendant of driving under the influence of alcohol (Veh. Code, § 23152, subd. (a))[1] and driving with a suspended license (§ 14601.2, subd. (a)). The trial court sustained prior strike, prior prison term, and prior driving under the influence conviction within the last 10 years allegations. It sentenced defendant to seven years in state prison, imposed various fines and fees, and awarded 558 days of presentence credit (279 actual and 279 conduct).

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Defendant filed a supplemental brief raising 13 separate issues.

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[1] Undesignated statutory references are to the Vehicle Code.

Defendant first claims appellate counsel was ineffective for filing a *Wende* brief that does not address any issues and states the facts of the case in a manner favorable to the prosecution.

" ' "[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because [her] 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citation.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" [Citation.]' " (*People v. Avena* (1996) 13 Cal.4th 394, 418.)

As we shall explain, defendant's contentions in his supplemental brief lack merit and our own review does not find any arguable error that would lead to a more favorable result for defendant. His claim therefore fails as defendant has failed to establish prejudice.

Defendant claims the jury erroneously returned guilty and not guilty verdicts on the charge of driving under the influence.

Defendant was charged in count one with driving under the influence (§ 23152, subd. (a)) and in count two with driving with a blood-alcohol level of 0.08 percent or higher (§ 23152, subd. (b)). The verdict form given to the jury for count one correctly described the charge as driving under the influence, a violation of section 23152, subdivision (a). The verdict form for count two describes the charge as driving with a blood-alcohol level of 0.08 percent or higher but states this is a violation of section 23152, subdivision (a). The trial court's instructions correctly state the appropriate Vehicle Code section numbers for the two counts. Following the verdicts, the prosecutor pointed out the error in the verdict form for count two. The trial court agreed to amend the verdict form by interlineation to conform to the information. The

jurors were informed of the error in the verdict form, affirmed their understanding of the error, and agreed to the correction.

Contrary to defendant's contention, he was not convicted and acquitted of driving under the influence. Rather, he was convicted of driving under the influence and acquitted of driving with a blood-alcohol level of 0.08 percent or higher, but the verdict form for count two was erroneous. The defect in the verdict form was a clerical error subject to correction upon the discovery of the error. (*People v. Trotter* (1992) 7 Cal.App.4th 363, 369-370.) The error was corrected and the correction was affirmed by the jury. Defendant was not prejudiced by this error.

Defendant contends the trial court erred in allowing the information to be amended to show that the charge of driving on a suspended license in count three took place on May 21, 2012, rather than May 21, 2010. Penal Code section 1009 allows an amendment at any stage of the proceedings provided the amendment does not prejudice the substantive rights of the defendant and does not charge an offense not shown by the evidence taken at the preliminary hearing. (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 554.) The trial court's exercise of its discretion to grant a motion to amend under section 1009 is broad and will not be disturbed on appeal absent a clear abuse of discretion. (*People v. Jones* (1985) 164 Cal.App.3d 1173, 1178-1179.) Amending the information before trial to allow the charge to correctly state the date of the alleged offense does not prejudice defendant and his claim is therefore without merit.

Defendant claims there is insufficient evidence to support his driving under the influence conviction.

"To determine whether the prosecution has introduced sufficient evidence to meet [the reasonable doubt] burden, courts apply the 'substantial evidence' test. Under this standard, the court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact

could find the defendant guilty beyond a reasonable doubt.' [Citations.] The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on ' "isolated bits of evidence." ' [Citation.]" (*People v. Cuevas* (1995) 12 Cal.4th 252, 260-261, italics omitted.)

There is overwhelming evidence of defendant's guilt. Defendant admitted driving after drinking alcohol, both in the recorded conversations with Sencion and in his trial testimony. Officer Waggoner testified that the hood of defendant's car was warm, which is circumstantial evidence that defendant's car had been recently driven. Defendant's blood-alcohol level tested at 0.26 percent.

Defendant asserts his innocence based on the not guilty verdict in count two and his contention that there was no evidence showing how long it was between when he drove and when he was tested for blood alcohol. The not guilty verdict in count two is irrelevant to the validity of his conviction in count one. "An acquittal of one or more counts shall not be deemed an acquittal of any other count." (Pen. Code, § 954.) Defendant's theory regarding the timing of his driving is fatally undercut by the evidence that his car had been driven shortly before Officer Waggoner's arrival. Substantial evidence supports his conviction for driving under the influence.

Defendant contends prosecution witnesses were improperly recalled as they had been previously dismissed but not told they were subject to recall. Evidence Code section 778 states: "After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion." Defendant objects to allowing witnesses to be recalled but does not show how this was an abuse of the trial court's discretion. His claim is therefore without merit.

Defendant contends his upper term sentence for driving under the influence was unjustified and that he was not given a timely probation report, which he claims has numerous errors. The trial court imposed the upper term for driving under the influence

based on defendant's number of prior convictions and his failure to complete probation or parole without violations. The trial court did not abuse its discretion. A single factor in aggravation will justify the trial court's imposition of the upper term. (*People v. Sandoval* (2007) 41 Cal.4th 825, 848.) A sentence is an abuse of discretion if the trial court "relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision. [Citations.]" (*Id*. at p. 847.) Here, the trial court found several aggravating factors that are supported by the record, which shows numerous prior misdemeanor and felony convictions, as well as his committing offenses while on probation or parole.

As to the probation report, defendant did not get his copy of the probation report until the day of the sentencing hearing but was allowed to read it and discuss it with his attorney. Counsel then raised several objections to the probation report; the trial court either modified the probation report in conformance with the objections or stated it would not consider items in the report to which the defense objected. "It is settled that failure to object and make an offer of proof at the sentencing hearing concerning alleged errors or omissions in the probation report waives the claim on appeal. [Citations.]" (*People v. Welch* (1993) 5 Cal.4th 228, 234.) Defendant is wrong when he argues that he "was never given a proper platform to contend" the alleged errors in the probation report. Those errors in the probation report alleged in his supplemental brief that were not raised at sentencing are forfeited.

Defendant next argues that various items he presented to the trial court are not in the record. The items defendant refers to are various items of evidence he presented to the trial court or moved for the trial court to preserve in the record while represented by counsel. " 'When a defendant chooses to be represented by professional counsel, that counsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant' [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 729.) Deciding what evidence to present to the trial court or to place into the record is entirely within the

control of appointed counsel for a defendant. The trial court had no obligation to consider the evidence or motions to preserve evidence presented by defendant.

Defendant claims trial counsel was ineffective for failing to object to CALCRIM No. 372 (flight as evidence of guilt). " 'A flight instruction is proper whenever evidence of the circumstances of [a] defendant's departure from the crime scene . . . logically permits an inference that his movement was motivated by guilty knowledge.' [Citation.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 522.) Defendant fled from Officer Waggoner when the officer went to defendant's apartment. Any objection to CALCRIM No. 372 would have been futile; declining to raise a futile objection is not ineffective assistance of counsel. (See *People v. Anderson* (2001) 25 Cal.4th 543, 587.)

Defendant contends trial counsel was ineffective by improperly using hearsay during her examination of defendant when she asked him whether he had heard Officer Waggoner's testimony regarding statements made by Lovett. The questioning was not used to elicit out-of-court statements for the truth of the matter asserted; therefore, there was no erroneous admission of hearsay evidence. (Evid. Code, § 1200, subds. (a), (b).)

Defendant also claims trial counsel was ineffective during closing argument by referring to defendant's fleeing the scene. Defense counsel did no more than try to address a weakness in her case, defendant's flight, rather than ignore it. This is a sound tactic that any competent attorney routinely employs. Doing so is not ineffective assistance of counsel.

Defendant next contends the trial court improperly joined another case defendant had before the court and thereby erroneously deprived him of his right to represent himself in that case. During the prosecution of this case, defendant also had a trailing misdemeanor case, case No. 12M06546. In January 2013 defendant, who was representing himself in the misdemeanor case, made a motion to dismiss it. At the time, defendant was represented by counsel in this case, the felony prosecution. After defendant, the prosecutor, and the trial court discussed how this was causing confusion,

the trial court gave defendant the option of representing himself in both cases or having counsel represent him in both cases. When defendant did not choose, the trial court revoked defendant's right to represent himself in the misdemeanor case and appointed his counsel in the felony case to represent him in that case.

There is no appeal of case No. 12M06546 before us. Since any possible error occurred only in that case, we cannot address it in this appeal.

Defendant claims his recorded conversations from jail were improperly admitted as they lacked foundation and were "submitted in an untimely legal fashion." Defense counsel did not object to the tapes. The failure to object to evidence forfeits any claim it should have been excluded. (Evid. Code, § 353, subd. (a) [objections must be timely and specific]; see *People v. Holford* (2012) 203 Cal.App.4th 155, 168-170.)

Defendant claims there was "an abuse in excessive enhancements in this case that has resulted in a sentence of over 1136% of what a maximum sentence would ordinarily be in a case like this." Defendant arrives at this number by comparing his sentence to a misdemeanor sentence for a second driving under the influence conviction within 10 years of the first. Defendant's sentence is legal. He was convicted of felony driving under the influence because he had a prior felony driving under the influence conviction within the last 10 years. (§ 23550.5, subd. (a)(2).) As previously discussed, his upper term of three years was within the trial court's discretion. That sentence was then doubled to six years for the strike, and then another year was added for the prior prison term. Defendant's sentence was legal and, in light of his extensive criminal record, was not a miscarriage of justice.

Defendant also raises additional claims of ineffective assistance of counsel. Defendant alleges numerous examples of ineffective assistance, many of which involve matters outside the record. The California Supreme Court has "repeatedly emphasized that a claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding. [Citations.]" (*People v. Michaels* (2002) 28 Cal.4th 486, 526.) Defendant's

claims, which involve matters such as alleged failure to investigate or possible tactical decisions such as the conduct of cross-examination, are better addressed on habeas corpus. This is particularly appropriate where, as here, defendant claims he has over 100 examples of alleged ineffective assistance he has not presented. We therefore decline to reach the merits of these claims.

Finally, defendant raises miscellaneous "prejudices." His claim that he was not asked to plead to the charges after dates were changed is without merit as amending the information does not require a new plea. Defendant's claim that he was not aware the jury had a transcript of the taped conversations when he testified does not allege any error.

Defendant's contention that a prior conviction for child endangerment[2] was improperly used to impeach him because it was not a crime of moral turpitude (see *People v. Sanders* (1992) 10 Cal.App.4th 1268, 1270) was forfeited because defense counsel did not object to its admission on those grounds. Any error is also harmless in light of the overwhelming evidence of guilt. (See *ibid.* & fn. 2 [applying *People v. Watson* (1956) 46 Cal.2d 818 harmless error standard to improper admission of child endangerment conviction as impeachment evidence].) His claim that there was no proper foundation for Officer Waggoner's testimony that defendant drove while intoxicated is likewise forfeited for lack of objection.

Defendant's claim that the trial court improperly told the jury on two occasions to disregard his explanations is forfeited because he does not provide citations to the record. (See *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 743 [lack of adequate citation to the record forfeits the claim of error].)

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[2] Defendant mistakenly refers to Penal Code section "173(a)(a)," when the actual conviction was for Penal Code section 273a, subdivision (a).

His claim that the audio recordings of his conversations with Sencion were inadmissible under the marital privilege is wrong. At the beginning of their conversation, defendant and Sencion are informed that the call is being recorded. The marital privilege, which applies only to confidential communications between spouses (Evid. Code, § 980; *People v. Cleveland* (2004) 32 Cal.4th 704, 742-743), does not apply.

Finally, defendant alleges a *Miranda* violation.[3]

Officer Waggoner testified at a *Miranda* hearing that he detained defendant as soon as he first contacted him, at the threshold of the apartment. Defendant spontaneously told Sencion not to say anything. Officer Waggoner took defendant to the patrol car; before getting into the car, he asked defendant if he knew anything about the traffic collision. Defendant was not yet handcuffed. When defendant said he wanted a lawyer, Officer Waggoner arrested him, placed him in handcuffs, put him into the patrol car, and shortly thereafter gave him a *Miranda* warning. Officer Waggoner did not ask defendant any questions other than for identifying information once defendant was put into the patrol car.

Defendant made spontaneous statements that he did not have anything to drink and that someone named Mike had been driving. Those statements were made at the highway patrol office, after he had been given his *Miranda* warnings. Before administering a field sobriety test, Officer Waggoner did ask defendant whether he had been drinking, but defendant did not answer then; the statement that he did not drink was spontaneous and came later. The trial court ruled that Officer Waggoner was credible and defendant's spontaneous statements, but nothing else, were admissible.

"Once a suspect has invoked his rights under *Miranda* to have an attorney present during custodial interrogation, he is 'not subject to further interrogation by the authorities

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

until counsel has been made available to him, unless the [suspect] himself initiates further communication, exchanges, or conversations with the police.' [Citation.] Spontaneous statements are not the product of interrogation and therefore are not violative of *Miranda*. [Citation.]" (*People v. Mobley* (1999) 72 Cal.App.4th 761, 791-792, disapproved on other grounds in *People v. Trujillo* (2006) 40 Cal.4th 165, 181, fn. 3.) There is no *Miranda* error here as the trial court properly suppressed all statements but those spontaneously made by defendant.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

MURRAY, J.